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Supreme Court, U.S.
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No. 99-1556

In The

Supreme Court of the United States

ALCOA INC., and VANALCO, INC.,

Petitioners,

v.

BONNEVILLE POWER ADMINISTRATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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MISCELLANEOUS

13 James Wm. Moore, Moore's Federal Practice § 65.22[1][b] (Daniel R. Coquillette et al., eds., 3d ed. 2000) 1

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Petitioners ask this Court to review the determination of the Circuit Court that neither it nor the District Court has the jurisdiction to provide temporary relief to parties suffering irreparable harm of constitutional stature.

Petitioners' fundamental position is that, given their well-founded allegations of First Amendment violations, "*some* court has power" to presently address these constitutional questions and provide temporary relief. (Pet. at 23.) Petitioners rely on *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972), for the proposition that the First Amendment guarantees the right of access to the courts (Pet. at 13); on *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965), for the constitutional requirement of a timely determination of First Amendment claims (Pet. at 13); and on the teaching of *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976), that deprivation of First Amendment rights, "for even minimal periods of time," by itself constitutes irreparable injury. (Pet. at 17.)[1] The Government offers no responsive argument in this

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[1] Although *Elrod* is a plurality opinion and some members of the Court disagreed with the plurality's views on the practice of patronage dismissals, no member of the Court disputed that the deprivation of First Amendment rights by itself constitutes irreparable harm. Further, the Circuit Courts have without exception followed *Elrod*'s teaching on this point. *See 13 James Wm. Moore, Moore's Federal Practice* § 65.22[1][b], at 65-45 n.13 (Daniel R. Coquillette et al., eds., 3d ed. 2000).

regard; indeed it includes no mention of these authorities, among others.[2]

> *Elrod* presented to this Court the question:
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> "[W]hether public employees who allege that they were discharged or threatened with discharge solely because of their partisan political affiliation or nonaffiliation state a claim for deprivation of constitutional rights secured by the First and Fourteenth Amendments." 427 U.S. at 349, 49 L. Ed. 2d at 551.

The Court concluded that the practice of patronage dismissals violates the First Amendment and that the public employees had "stated a valid claim for relief." 427 U.S. at 373, 49 L. Ed. 2d at 565.

In the instant case there can be no question that Petitioners' allegations state a claim for First Amendment violations and that, under *Elrod*, Petitioners are likely entitled to temporary relief. Given this, surely it must be the case that some federal court – the District Court if not the Circuit Court – has jurisdiction to provide such relief. The Government provides no response to this reasoning.

The Government urges that jurisdiction of the Circuit Court "extends only to final actions of the BPA" and that this occurs only upon FERC approval. (Brief in Opp. at 8.) The Government ignores Petitioners' statutory argument that the jurisdictional provision of the Northwest Power Act does not require FERC finality for a constitutional

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[2] The Government mentions, twice, (Brief in Opp. at 5, 9), that there is no conflict in the Circuits. BPA is the Government agency and only the Ninth Circuit has jurisdiction under the Northwest Power Act to review BPA actions.

challenge to BPA action. (Pet. at 18-19.) The Government also ignores Petitioners' position that the Compromise Approach involves contracts for the sale of electrical power and that the Northwest Power Act expressly gives the Circuit Court jurisdiction for direct review of the power contracts. (Pet. at 21.)

The Government acknowledges that "in an 'extreme case' " a governmental action may be challenged on constitutional grounds "before it is final." (Brief in Opp. at 9.) The Government waves away any suggestion that this case could qualify for this exception, relying on the "observ[ation]" of the Ninth Circuit that "petitioners' claims are 'insubstantial.' " (Brief in Opp. at 9.)[3] The Government misrepresents the "observ[ation]" of the Circuit Court in the order that disposed of Petitioners' appeal from the District Court's dismissal for lack of jurisdiction. Petitioners had moved for summary disposition of their appeal to have the jurisdictional issue that the appeal presented considered by the same Motions Panel that had before it the question of the Ninth Circuit's original jurisdiction. When the court granted Petitioners' motion and then summarily affirmed the District Court, it expressed no opinion on the merits of Petitioners' First Amendment claims arising out of the Compromise Approach. (*See* Pet. at 4a.)

The Government urges that there can be no First Amendment violation in this case because Petitioners

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[3] The Government's Brief states: "Petitioners' First Amendment claims are without foundation, as is their claim of irreparable injury. As the court of appeals correctly observed, petitioners' claims are 'insubstantial.' " (Brief in Opp. at 9.)

"did not agree to the Compromise Approach" and were "not bound by any of its restrictions." (Brief in Opp. at 10.) It approaches the astonishing that the Government could believe it can threaten to penalize someone for exercising First Amendment rights – and carry through on its threat – but not thereby violate First Amendment guarantees.[4] Just last week this Court, in an opinion from which no Justice dissented as to the applicable First Amendment principles,[5] underscored that when the Government places content-based burdens on protected expression, it is subject to the same rigorous scrutiny as if it had banned that expression outright. *United States v. Playboy Entertainment Group, Inc.*, No. 98-1682 (May 22, 2000), slip op. at 8.

The Government contends that Petitioners cannot complain that the Compromise Approach deprived their expression of the augmented power of the voices of other DSIs because it was not the Compromise Approach that did this, but rather "the DSIs' voluntary decision to accept" the Compromise Approach. (Brief in Opp. at 10.) This flatly ignores this Court's considerable jurisprudence on the topic of unconstitutional conditions. (*See* Pet. at 14-16.)

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[4] BPA advised Petitioners that unless they agreed to compromise their First Amendment rights, BPA would propose that they receive less power and at a higher rate than those DSIs who signed on to the Compromise Approach. BPA's 2000 Final Power Rate Proposal, issued earlier this month, carries through with this threat.

[5] *See United States v. Playboy Entertainment Group, Inc.*, No. 98-1682, Breyer, J., dissent, slip op. at 1 (U.S. May 22, 2000): "The basic, applicable First Amendment principles are not at issue."

When the Government burdens protected expression, the government bears the burden of proving the constitutionality of its actions. *Playboy*, slip op. at 12. The Government's Brief, however, does nothing to gainsay the serious and substantial nature of Petitioners' claims.

In this posture the Court should grant the Petition and take up whether, by statutory provision or constitutional requirement, the federal courts have the power to address Petitioners' claims and afford temporary relief.

Respectfully submitted,

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